

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE LITIGATION

MDL No. 1456

THIS DOCUMENT RELATES TO:

CIVIL ACTION: 01-CV-12257-PBS

CLASS 1 J&J

Judge Patti B. Saris

**DECLARATION OF STEVE W. BERMAN IN SUPPORT OF CLASS 1 PLAINTIFFS'
STATEMENT REGARDING DR. HARTMAN'S 30% BENCHMARK**

I, Steve W. Berman, duly declare under penalty of perjury as follows:

1. I am a partner of Hagens Berman Sobol Shapiro LLP, resident in its Seattle, Washington, office, and I am Co-Lead Counsel for the plaintiffs in the above-captioned matter. I submit this declaration under penalty of perjury in support of Class 1 Plaintiffs' Statement Regarding Dr. Hartman's 30% Benchmark.

2. Attached hereto as Exhibit 1 is a true and correct copy of the July 9, 2008 Order of the First Circuit Court of Appeals in Appeal Nos. 08-1055 and 08-1056.

Executed this 19th day of July, 2010.

/s/ Steve W. Berman

STEVE W. BERMAN

Exhibit A

JUL 14 2008

HAGENSTADT LLP

United States Court of Appeals For the First Circuit

Nos. 08-1055
08-1056

IN RE: PHARMACEUTICAL INDUSTRY AVERAGE
WHOLESALE PRICE LITIGATION.

ORDER OF COURT

Entered: July 9, 2008

Abbott Laboratories ("Abbott Labs"), a party to the underlying district court litigation but not to the above appeals, has moved to file identical amicus briefs in these two appeals in support of the defendants-appellants, Bristol-Myers Squibb Co. ("Bristol-Myers") and Astrazeneca Pharmaceuticals LP ("Astrazeneca"), respectively. The plaintiffs-appellees have opposed the motions on the ground, among others, that the entire thrust of the amicus briefs is to present evidence that was not before the district court and that leave should be denied to submit such extra-record evidence on appeal.¹ We agree and therefore deny the motions.

As Abbott Labs concedes, the evidence it seeks to submit here was not before the district court. Accordingly, it is not part of the district court record and therefore should not be considered by this court. Ruiz-Casillas v. Camacho-Morales, 415 F.3d 127, 132 (1st Cir. 2005). That well-settled principle, which we have strictly enforced, see, e.g., United States v. Pacheco-Ortiz, 889 F.2d 301, 307 n.3 (1st Cir. 1989), applies regardless of whether the extra-record evidence is submitted by a party, Gillis v. SPX Corp. Individual Account Ret. Plan, 511 F.3d 58, 65 (1st Cir. 2007), or, as here, by an amicus, Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12, 23 n.8 (1st Cir. 1982); Wiggins Bros., Inc. v. Dep't of Energy, 667 F.2d 77, 83 (Temp. Emer. Ct. App. 1981).

The motions for leave to submit amicus briefs are denied.

¹Bristol-Myers has also opposed the motion on that ground. Without formally opposing the motion, Astrazeneca has stated "that it neither solicited nor consented to the filing of Abbott's brief, and that the record on this appeal is sufficient to resolve the issues presented."

By the Court:

/s/ Richard Cushing Donovan, Clerk.

cc:

Steve Berman

Rita Hanscom

Donald Haviland

Steven Edwards

Andrew Schau

D. Scott Wise

Jill Brenner Meixel

Scott Kinsel

Jennifer F. Connolly